

Never Trust Your Cotenants – Ouster in West Virginia

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“My possession of said land has been, and is, actual, hostile, visible, notorious, exclusive, continuous and peaceable.” One of several cotenants to land in northern West Virginia attested to this in an affidavit in 1903. While it is clear that the affiant was attempting to adversely possess the property, can one cotenant, who has an equal right to the possession of commonly held property along with all other cotenants, adversely possess the interests of his cotenants? West Virginia courts recognize the doctrine of ouster, which allows a cotenant in possession to acquire all interest of his or her cotenants in property, similar to adverse possession. As with its sister concept, adverse possession, recorded evidence of ouster is difficult to identify. In situations satisfying the elements for ouster, identifying and applying the principle is an effective way to clear clouds on title.

West Virginia courts recognize that the ouster of a cotenant may occur when all elements of adverse possession are met and there are objective facts to show specific intent to oust the cotenant.¹ Ouster requires a tenant in common to occupy common property openly, notoriously and exclusively as the sole owner, while keeping up improvements, paying the real estate taxes and receiving the rents and profits.² Proof of these elements shows an intention to ignore the rights of the ouster’s cotenants and such acts amount to an expulsion of non-possessing cotenants.³ The ouster’s possession will be regarded as adverse to his cotenants from the time the cotenants are shown to have knowledge of such acts and claims.⁴ The ousting cotenant must take actual possession of the property and claim title to the entire property for a period that satisfies the statute of limitations for adverse possession (10 years in West Virginia).⁵ Obtaining an interest in property by deed is not enough to affect ouster; the ousting cotenant must take actual possession of the land.⁶

Silent possession is not sufficient. An ousting cotenant must act openly and notoriously to a degree that precludes doubt of the ouster’s intentions. A written document is not necessary to affect ouster. Acts not witnessed by written documents, such as verbal partitions, exclusive occupation with notice to cotenants of the hostility of the claim, a verbal promise to convey land or a repudiation or disavowal of cotenancy with the non-possessing cotenants have all effectively shown ouster.⁷ Because a cotenant has no duty to monitor property held in common for dishonest actions by an ousting cotenant, non-possessing cotenants must have notice of the ouster’s claim.⁸

The greatest difficulty in proving ouster is that evidence often hinges on facts outside of record title. The intent of the ousting cotenant, exclusivity of the ouster’s possession and non-possessing cotenants’ knowledge of the adverse claim can be difficult to determine via record title. Courts have found that extensive improvement by the ousting cotenant of a nature that was certain

¹ *Cooley v. Porter*, 22 W. Va. 120 (1883).

² *Cochran v. Cochran*, 55 W. Va. 178 (1904); See W.Va. Code §. 55-2-1.

³ *Id.*

⁴ *Id.*

⁵ *Hutchens v. Denton*, 83 W. Va. 580 (1919).

⁶ *Reed v. Bachman*, 61 W. Va. 452 (1907).

⁷ See *Russell v. Tennant*, 63 W. Va. 623 (1908); *Cochran* 55 W. Va. 178; and *Reed* 61 W. Va. 452.

⁸ See *Reed* 61 W. Va. 452.

to place cotenants on notice is sufficient to prove open and notorious exclusive possession.⁹ Such improvements or development may include timber or coal operations.¹⁰ Evidence of timber or coal development may also appear in assessment records, giving title examiners a firm piece of evidence for which to search and utilize in an ouster analysis.

There are several clues that title examiners can point to as signs that ouster may have occurred. Usually an examiner is alerted to the possibility of ouster by a lack of recorded documentation regarding the property from non-possessing cotenants. An affidavit whereby an ousting cotenant claims exclusive ownership in land is a clear indication that a cotenant in possession is attempting to oust his non-possessing cotenants.¹¹ An instrument providing an ousting cotenant with colorable title to all interest in property is also a good indication that the ousting cotenant may claim exclusive possession of the land. Instruments providing colorable title can include deeds from cotenants purporting to convey all interest in property, improperly executed or acknowledged deeds, void partition actions, deeds executed by void powers of attorney and land sale contracts with no deed finalizing the sale.

Evidence of extensive development of the land by the cotenant in possession, including timber and coal development, can also indicate that ouster occurred.¹² Other evidence which may indicate that one cotenant has exclusive control and possession includes a change in assessments removing cotenants, conveyances of the land not executed by the non-possessing cotenants and mineral leases executed by only the cotenant in possession. Because the taking of profits by a cotenant is a legal right, mineral development alone may not be adverse to non-possessing cotenants. A cotenant's right to mineral development is subject to an accounting of profits to fellow cotenants. Evidence that the cotenant in possession did not account to cotenants for mineral development would show an intent to exclusively possess the property.

In instances where non-possessing cotenants disappear from record title, there are likely circumstances outside of the record which indicate that the ousting cotenant put non-possessing cotenants on notice of his or her exclusive claim. Such circumstances could include verbal notification of the exclusive claim, verbal agreements or land development. A title examiner could infer the existence of an unrecorded exclusive claim through a lack of recorded documentation regarding the interests of non-possessing cotenants and evidence of sole exercise of ownership by the cotenant in possession in the chain of title.

The ouster of cotenants to a severed mineral estate is more difficult to accomplish. If ouster is commenced prior to an oil and gas severance by the ousting cotenant, continued occupation of the surface will provide the severed mineral owners with valid title to the minerals.¹³ If ouster of cotenants to the surface occurs after a mineral severance, possession of the surface will not divest the owners of the severed minerals. Because West Virginia does not allow production of oil and gas without consent from all cotenants, actual development of the minerals for the statutory period without an accounting may be sufficient to acquire title by ouster.¹⁴ The prohibition on production without consent of all cotenants is subject to the Cotenancy Modernization and Majority Protection

⁹ *Laing v. Gauley Coal Land Co.*, 109 W. Va. 263 (1930).

¹⁰ *Id.*

¹¹ See *Cooey*, 22 W. Va. 120, *Laning*, 109 W. Va. 263 and *Russell*, 63 W. Va. 623.

¹² *Laing*, 109 W. Va. 263.

¹³ 1 Williams & Meyers, *Oil and Gas Law* § 224 (2018).

¹⁴ *Id.*

Act, which allows production with the consent of only 75% of cotenants.¹⁵ However, West Virginia courts have not addressed the ouster of cotenants to severed minerals. Although ouster of cotenants to severed minerals is more difficult, land with a long history of mineral development may warrant more extensive research into production history to determine if sufficient evidence for ouster is present.

Confirming title to land using the doctrine of ouster is not painless. For more recent ouster claims, obtaining a declaratory judgment through an action to quiet title confirming that the cotenant in possession ousted the non-possessing cotenants is likely necessary. Older ouster claims with a long record history of exclusive ownership by the ousting cotenant and his or her successors may not require an action to quiet title. The doctrine of tacking applies to ouster claims, as with adverse possession. A current cotenant in possession may claim ouster through the actions of his predecessors in interest which occurred decades ago. In instances where the cotenant in possession stands to obtain significantly larger payments through a successful ouster claim, the landowner may willingly undertake an action to quiet title independently of the mineral developer, relieving the developer of significant costs and the headaches associated with litigation.

Our firm recently encountered a situation in northern West Virginia which presented a strong case for the application of ouster. Adam Manning leased his farm to Donald Franks in 1862. The agreement stated that upon Adam and his wife's deaths, Elizabeth Franks would receive the farm. Elizabeth was Adam's daughter and Donald's wife. Upon Adam's death prior to 1872, all of his heirs, except Elizabeth and a son, John Manning, conveyed their interests in the farm to Donald. John Manning conveyed his interest to Elizabeth Franks. Elizabeth died intestate prior to 1903 and pursuant to West Virginia intestacy law, her children with Donald acquired her interest in the farm. John Manning later quitclaimed the same interest he previously conveyed to Elizabeth to Donald Manning, providing Donald with color of title to John's interest. Donald executed and recorded an affidavit stating that his children were the intestate heirs of his wife, but that Donald had exclusive ownership and possession of the farm. Donald clearly intended to provide notice of his open, notorious and hostile claim to all interest in the farm through the affidavit. Donald's Will later devised the farm to only one of his sons, and none of Donald and Elizabeth's other children contested his ownership.

The instruments of record show that Donald effectively ousted his cotenants. Record title reflects sole and exclusive possession by Donald adverse to his wife and children. The affidavit provides notice to all parties that Donald claimed exclusive ownership. The lack of adverse claims by Donald and Elizabeth's other children shows that they recognized Donald's exclusive ownership of the farm. Had the title examiner not applied ouster in this instance, the oil and gas developer would be faced with an extensive heirship search and numerous additional cotenants. Ownership of the oil and gas by non-possessing cotenants would have also created conflicts with future oil and gas severances. Due to the age of the ouster claim at issue, no curative action was recommended by the title examiner. The recorded affidavit makes this situation straightforward. Donald clearly claimed exclusive possession adverse to his children in order to acquire all interest in the farm, and the affidavit provided record notice to all parties. However, the title examiner could have determined that Donald ousted his cotenants even if the affidavit were not recorded.

The doctrine of ouster applies to only a narrow set of factual circumstances and may be difficult to prove through record title. However, a knowledgeable title examiner should understand

¹⁵ See W.Va. Code §§. 37B-1-1, et seq.

ouster and recognize situations where it may apply. Perfecting a claim of ouster does require some work on the part of the ousting cotenant, but can compensate for any difficulty by quieting a landowner's title and providing oil and gas developers with an easier path to production. In spite of its difficulties, ouster remains an important principle to be considered by title examiners and operators.